Supreme Court, U. S.
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No. 95-504

In The

# Supreme Court of the United States

October Term, 1995

STATE OF FLORIDA,

*Petitioner,*

*vs.*

CARLOS MIRAGAYA,

*Respondent.*

*On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit*

## RESPONDENT'S BRIEF IN OPPOSITION

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15 pp

## QUESTION PRESENTED

Was the decision of the Second District Court of Appeal and the Florida Supreme Court consistent with this Court's holding in *Maryland v. Macon*, 472 U.S. 463, 105 S. Ct. 2778, 86 L. Ed. 2d 370 (1985).

## LIST OF PARTIES

Petitioner is the State of Florida, represented by Susan D. Dunlevy, Assistant Attorney General, Department of Legal Affairs, 2002 North Lois Avenue, Suite 700, Tampa, Florida 33607-2366.

Respondent is Carlos Miragaya, an individual, whose address is 2540 39th Street S.W., Naples, Florida 33964. Respondent is represented by Donald P. Day, Esquire, Berry & Day, P.A., 2671 Airport Road South, Suite 301, Naples, Florida 33962.

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## RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

The Respondent, Carlos Miragaya, respectfully requests this Court deny the Petition for a Writ of Certiorari submitted by the Petitioner, State of Florida.

## STATEMENT OF THE CASE

The case at bar arose when Respondent was charged with six misdemeanor counts of distribution and three counts of possession with intent to distribute obscene material in violation of § 847.011(1)(a), Florida Statutes (1991). Respondent was charged after two undercover Collier County Sheriff's Deputies went to the Respondent's business, C & M Home Video, and rented three video tapes. The undercover deputies travelled to the Respondent's business after complaints about "dirty movies". Upon arrival, the undercover officer rented three movies for a period not to exceed twenty-four hours. The undercover officers then took the videos to the Collier County Sheriff's Department where they viewed the material.

Collier County Sheriff's Detective Ron Myers and the other officers involved made a determination that the video material was obscene and proceeded to make two copies of each of the three video tapes, giving one copy to the State Attorney's Office, and the other copy stayed at the Collier County Sheriff's Office. The video tapes were copied for use as evidence in future proceedings based on the determination by Collier County Sheriff's Department detectives that the material was obscene. After review of the material by Assistant State Attorney William Dearborn, he also reached a conclusion that the video-taped materials were obscene and charged the Respondent with the criminal complaint. In response to this complaint, the Respondent removed the video tapes from the shelves.

Petitioner's Statement of the Case omits relevant facts regarding the question of whether Respondent had removed the video tapes in issue from the shelves for fear of further prosecution. Petitioner alleges that there was "no evidence" offered in the original hearing that the Respondent had removed the video tapes in issue from the shelves for fear of further

prosecution. Petitioner cites Transcript, page 24, to support her claim. Directly contrary to this assertion, the Record reflects that there was a stipulation by the prosecution in the original evidentiary hearing that the Respondent, Carlos Miragaya, had removed the three video tapes from the shelves of his store and that they had not been rented from the time he was served with the original criminal complaint. (T., pp. 12-13). Subsequent to the filing of criminal charges, Respondent filed a motion to suppress the physical evidence, arguing that the warrantless seizure by law enforcement violated the First and Fourth Amendments to the United States Constitution and the Florida Constitution. The trial court granted the Respondent's motion to suppress, finding that the officers' actions violated the Respondent's reasonable expectation of privacy in the video material and that the Collier County Sheriff's Office and the State Attorney's Office had ignored the rigorous procedural safeguards established by this Honorable Court before explicit materials could be seized as obscene.

The state appealed to the Circuit Court, which held that there had been neither an illegal search nor a seizure, because obscene material was not protected. The court relied on the case of *Stall v. State*, 570 So. 2d 257 (Fla. 1990), *cert. denied sub nom.*

Respondent filed a Petition for Writ of Certiorari to the Second District Court of Appeal after the Circuit Court's opinion was issued. The District Court of Appeal agreed with the position taken by the Respondent that the Collier County Sheriff's Office was attempting to circumvent the requirements that there be an obscenity determination by a judicial officer before material protected by the First Amendment could be seized. The court acknowledged that while it is true that law enforcement officers are allowed to keep a single copy of a video tape or movie for purposes of preserving the evidence, the lawful retention is dependent upon the issuance of a warrant for the seizure of the

item *prior* to the officer's obtaining it. The District Court of Appeal reversed the Circuit Court's opinion and the Petitioner filed a Petition for Writ of Certiorari to the Florida Supreme Court. The Florida Supreme Court refused to accept the Writ of Certiorari. The Petitioner then filed another Petition for Writ of Certiorari to this Honorable Court requesting relief.

## SUMMARY OF ARGUMENT

I. The Petition for a Writ of Certiorari fails to demonstrate an important reason for granting review. The Petitioner has failed to establish that the Florida Supreme Court's decision involves a federal question that is in conflict with the decision of any other state court of last resort. Secondly, the Petition for Writ of Certiorari fails to make any argument that would suggest that the decision by the Florida Supreme Court is in conflict in any way with any other state or of a United States Court of Appeals. Thirdly, the Petition for Writ of Certiorari does not argue that the Florida Supreme Court decided an important question of federal law which has not been addressed and should be settled by this Honorable Court. Finally, the Petition for Writ of Certiorari does not establish that the decision by the Florida Supreme Court conflicts with any other decision of this Honorable Court.

II. This case presents no issue appropriate for the Court's exercise of its discretionary jurisdiction. Petitioner's Writ of Certiorari only challenges the Circuit Court's interpretation of *Macon.*

III. Law enforcement may not seize material protected by the First Amendment to the United States Constitution and the Florida Constitution without the issuance of a warrant signed by a neutrally detached magistrate. *Roaden v. Kentucky,* 413 U.S. 496, 93 S. Ct. 2796, 37 L. Ed. 2d 757 (1973); *New York v. P.J. Video,* 475 U.S. 868, 873-874, 106 S. Ct. 1610, 89 L. Ed. 2d 871 (1986);

*Heller v. New York*, 413 U.S. 483, 93 S. Ct. 2789, 37 L. Ed. 2d 745 (1973).

IV. Owners of video rental businesses have a reasonable expectation of privacy that customers will not take the video material that is rented on a temporary basis and copy the material, thereby diminishing the owner's future potential rental value in the material.

V. The Collier County Sheriff's Department and the State Attorney's Office attempted to circumvent the requirement that there be an obscenity determination by a judicial officer of any item which is subject to First Amendment protection prior to its seizure. *Roaden v. Kentucky*, 413 U.S. 496, 93 S. Ct. 2796, 37 L. Ed. 2d 757 (1973).

## REASONS FOR DENYING THE WRIT

### I.

This case presents no issue appropriate for the Court's exercise of its discretionary jurisdiction. Petitioner's Writ of Certiorari merely challenges the Second District Court of Appeal's interpretation of *Maryland v. Macon*, 472 U.S. 463, 105 S. Ct. 2778, 86 L. Ed. 2d 370 (1985). Petitioner's Writ of Certiorari asserts that the decision in *Macon* will allow law enforcement to seize First Amendment material where there has been *no transfer of ownership* in the material.

Contrary to arguments set forth in the Petition for a Writ of Certiorari, this Honorable Court's opinion does not address the issue of whether police may copy material that has not been given to them to keep. *Macon* only addressed issues concerning the *transfer* of ownership in the material that was purchased by the officer. There was no discussion in *Macon* that the same rule of

law would apply to the owner of material who temporarily allowed a second party to review the material, with the owner expressly reserving a possessory right in the material.

In *Macon,* undercover officers purchased the material and this Honorable Court found that there was a transfer of ownership removing any reasonable expectation of privacy in the material that the original owner may have had. The Second District Court of Appeal correctly found that *Macon* was distinguishable. The District Court found that it was obvious that the Collier County Sheriff's Department and the State Attorney's Office were attempting to circumvent the procedural safeguards established by this Court before First Amendment material could be seized by law enforcement. The decision of the Second District Court of Appeal, later affirmed by the Florida Supreme Court, was made in accordance with long-standing, well-established law set by this Court with reference to First Amendment material.

Petitioner is correct in recognizing the legal proposition established in *Maryland v. Macon,* that a "seizure occurs when there is some meaningful interference with an individual's possessory interest in the property seized". 472 U.S. at 469, 86 L. Ed. 2d at 470. In the instant case, there were two significant interferences with the Respondent's possessory interest in the property seized by the Collier County Sheriff's Department. First, it is entirely reasonable to presume that owners of video stores have a reasonable expectation that customers will not rent the video-taped material and copy tapes for their own use later. Renters of video material clearly expect that the customers will pay them to temporarily possess the materials so that it can be viewed. If owners of video rental stores expect all of their customers to rent the material and copy the material for later use, there would be little need for a video rental business. Secondly, as the stipulation entered into between the state and the defense in the original proceedings (*see* Transcript, page 12) indicated, the

Respondent immediately removed the original tapes from the shelves, anticipating that the continued rental of the material would be an additional violation of Florida law. Therefore, the state's decision in charging the Respondent based on the material that had been previously copied significantly interfered with the Respondent's possessory interest and property rental value.

## II.

The Petition for Writ of Certiorari filed before this Honorable Court argues that the Respondent failed to demonstrate standing to argue a copyright infringement claim and that federal copyright laws *may* allow copying of the rented material. The question involving the seizure of the material in the instant case is not whether federal copyright laws have been violated, the question is whether the Respondent believed that he had an expectation of privacy in the material he rented that potential customers would not copy the rented material for their own use. This Honorable Court has recognized on many occasions that the question of whether a seizure has occurred will fall on whether there has been a seizure that has interfered with the reasonable expectation of privacy that the individual had in the material and secondly, that expectation is one that society is prepared to recognize. *Katz v. United States*, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967). Clearly, owners of video rental businesses do not expect their customers to copy the material that they rent for distribution and use at some later date. If owners of video store businesses expected the customers to copy all of the material they rented, there would be no need for a rental business. Owners of video rental materials make their money from the continuous rental of the materials. On the second question, if society is not willing to recognize the private property rights of individuals in rented, written or audio material, there would not be a copyright law protecting the materials. Clearly, society and the government recognize the need to protect the printed and

audio materials from illegal reproduction. It is inconceivable that the Petitioner can argue that the Respondent did not have a reasonable expectation of privacy in his rented video material that the material would not be rented and illegally reproduced for use in any manner. The question involved here is not whether federal copyright laws would have allowed some individual to copy the video-taped materials found in the Respondent's store. The question is whether the reasonable proprietor of such a business would believe that renters are not authorized to copy the materials found in their stores. Respondent would further assert that the issue of whether the materials found in video rental stores could be copied by law enforcement is unclear. Therefore, the owner's belief that the materials may not be copied is reasonable.

## III.

Petitioner argues that the "Fair Use Doctrine" would allow the seized material in the instant case to be used as evidence. Petitioner's claim completely ignores this Honorable Court's judicial opinions over the past twenty years concerning the danger of allowing law enforcement and prosecutors to reach a determination about arguable First Amendment material without seeking review by a neutrally detached magistrate. *Roaden v. Kentucky,* 413 U.S. 496, 93 S. Ct. 2796, 37 L. Ed. 2d 757 (1973); *New York v. P.J. Video,* 475 U.S. 868, 873-874, 106 S. Ct. 1610, 89 L. Ed. 2d 871 (1986); *Heller v. New York,* 413 U.S. 483, 93 S. Ct. 2789, 37 L. Ed. 2d 745 (1973). This Honorable Court has been unwavering in its position that material that is protected by the First Amendment to the United States Constitution will receive special protection that is not afforded to other potential contraband material. That special protection includes specific precautions that must be taken by law enforcement before seizure of the material or restraints on the distribution of the material may occur. If this Court were to accept the position taken by the Petitioner, law enforcement would no longer be required to seek

seek any neutral judicial determination about the status of arguable First Amendment material before seizure. The Fair Use Doctrine found in 17 U.S.C. § 107 was not established to allow law enforcement a loophole to avoid review by a neutrally detached magistrate before seizing potential First Amendment material.

## CONCLUSION

Accordingly, for all the foregoing reasons, Petitioner's request for a Writ of Certiorari should be denied.

Respectfully submitted,

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